to any further consideration of this case and that since there is nothing more of substance to be decided, the rights asserted herein are too important, not only to petitioner, but to countless others similarly situated, to be denied review now or to permit them to remain undetermined until the whole case is adjudicated. The decision in *Gleason*, 26 N. Y. 2d 28, 308 N. Y. S. 2d 347, has imposed divorce upon countless spouses separated under decrees entered prior to the effective date of the statute. If petitioner were required to wait to request a review until this whole litigation were adjudicated, including a further appeal to the Court of Appeals, another year and a half or two might elapse. In the interim many divorces will have been granted involving the precise constitutional questions presented herein. A reversal by this Court at that time will be of but academic value to those who had been subjected, over their objections, to decrees of divorce based on the decision in *Gleason*. The result of any such reversal would be irreparably lost to them.

The wife's denial in her answer of the formal allegation made in the plaintiff husband's complaint that he has substantially performed all of the terms and conditions of the decree in that he has "made the payments and maintained the insurance as ordered therein" was made for the reason that it is a jurisdiction requirement as respondent states at page 4 of his brief. The denial was made for the purpose of putting plaintiff to his proof without any reasonable expectation that he would be unable to prove substantial performance of the financial obligations provided for in the separation decree, particularly since performance of some of these financial obligations is peculiarly within his knowledge. This denial does not constitute an affirmative defense. It is to be noted that the statute (Domestic Relations Law §170 Sub. 5, Chapter 700 of the Laws of 1968. Appendix D1) requires proof by

the plaintiff that he has only "substantially performed," having been liberalized from the original requirement of proof that plaintiff has "duly performed" as provided in the original divorce reform law. (Chapter 254 of the Laws of 1966). It is thus all the more patent that petitioner herein has been denied any "defense" of substance other than her constitutional defenses. In *Local No. 438* v. *Curry*, 371 U. S. 542, 551, Mr. Justice White in delivering the opinion of the Court stated "Since there was nothing more of substance to be decided in the trial court, the judgment below was final within the meaning of 28 USC §1257 and within the scope of the Pope and Richfield cases."

Petitioner has since served an amended answer which is the same as the original answer, but which also includes the only affirmative defense which she has, namely, the constitutional defenses which this Court is being asked to pass upon.

Respondent asserts, at page 4 of his brief, that since the trial court has power to provide financially for a wife, and it has not as yet done so, the order is not final. We point out that the subsisting separation decree has already made such financial provisions, (all of which terminate on the death of the husband) and that when the separation decree is superseded by the divorce decree, the financial provisions will be carried over into the divorce decree. The broad and continuing power of the Court under §236 of the Domestic Relations Law to provide support for a wife in any matrimonial action, referred to by respondent at page 4 of his brief, is completely separable from the issues presented in this litigation and continues no matter what the status of the case or the time of entry of the decree. This would in no way affect the finality of the judgment for the purposes of giving this Court jurisdiction to review.

CONCLUSION

There is nothing more of substance to be decided below in this case and this Court has jurisdiction to entertain the petition and should grant the writ.

Respectfully submitted,

ZENAIDA DRABKIN,
Attorney for Petitioner.

MORTIMER H. KOENIG,
GRACE H. CONNELL,
JESSE SISKIND,
On the Brief.